REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 181 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 545 of 2007 of the Senior Resident Magistrate's Court at Kaloleni – Andayi W.F., SRM)

JOSEPH MUZUNGU RUWE ……..…… APPELLANT

- Versus -

REPUBLIC ……..…… RESPONDENT

J U D G M E N T

It was alleged that **JOSEPH MZUNGU RUWE** defiled a child aged 14 years, was tried and convicted on the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of The Sexual Offences Act. The trial court imposed a prison term of 15 years. The appellant has appealed against both conviction and sentence.

The appeal was opposed by the State who sought an enhancement of the jail sentence from the term of 15 years to at least 20 years. At that point I warned the appellant that the provisions of Section 354(3)(b) of The Criminal Procedure Code empowered this court, in appropriate circumstances, to increase the sentence in an appeal. I cautioned the appellant of that possibility and asked him whether or not he wished to pursue the appeal. I then adjourned to give the appellant time to reflect on it. On 14th November 2011 the appellant informed court that he would press on with the appeal.

The complainant (PW1) says that she was born in August 1992, although her mother thinks it was June 1993. An age assessment carried out at St. Luke's Hospital put her age at approximately 14 years as at 20th November 2007. So PW1 was about 14 years at the time the offence is alleged to have taken place on diverse dates between June 2007 and 14th November 2007. That on at least four occasions the appellant had sexual intercourse with her by inserting his penis into her vagina. She knew him well as he was a neighbour. On the first two occasions he threatened her with a knife and forcibly had sex with her. PW1 gave evidence on how on the 2nd occasion she was going for a funeral with other children when he led her to a bush and had intercourse with her. PW1 underwent a medical examination and the P3 form produced by PW3 showed that her hymen was broken. Although PW1 never told her mother (PW2) of these incidents her sister PW5 was fully in picture.

PW4 was told by his aunt PW2 that she had information that the appellant was sleeping with PW1. That on 19th November 2007 PW4 found that the appellant had parked his bicycle near the home of PW1. That the appellant was hiding in some maize. This aroused the suspicion of PW4. He returned there unnoticed

and found the appellant beckoning PW1 and PW5. It is then that the PW4 arrested the appellant. Both PW1 and PW5 corroborated this account.

When put on his defence, the appellant pleaded his innocence. He claimed that he was a victim of vendetta carried out by amongst others the Chief of Ribe. He alleges that the complainant only mentioned him after she was beaten and intimidated to do so.

This appeal raises the following four issues. That the appellant was charged and convicted upon a defective charge sheet. Secondly that the conviction was based on the evidence of PW1 and PW5 which was not properly received. That the two are minors but the court did not carry out voir dire proceedings before receiving their evidence. Further that the prosecution case was weak and inconsistent. And lastly the court failed to give due consideration to the appellants defence.

This is a first appeal. My duty is to consider and re-evaluate all evidence that was adduced in the lower court and to draw my own conclusions. This court is aware that, unlike the trial court, it has not seen or heard the witnesses testify.

I start by addressing the technical issues raised by the appeal. The appellant was convicted on the basis of the Amended Charge Sheet read over to the appellant on 28th April 2008. Although the court copy was missing, and appears to have been mislaid, a copy was provided to this court by Kaloleni Police Station. Fortunately that copy was one duly signed by the presiding Magistrate. The principle charge in the Amended Charge Sheet reads as follows-

"Defilement of a child contrary to Section 8(1) as read with Section 8(3) of The Sexual Offences Act No. 3 of 2006.

On diverse dates between June 2007 and 14th November, 2007 in Kaloleni District within Coast Province, unlawfully caused penetration with a genital organ namely penis to the genital organ namely VAGINA to (sic) girl aged 14 years."

I have taken the trouble of reproducing the charge sheet to show that it is not defective in any way. The original charge sheet provided the punishment section only. The amended charge, on which the conviction was based, has both the definition and punishment Section. The complaint is therefore without any merit at all.

The appellant is also aggrieved because PW1 and PW2 (he must have meant PW5) testified without being subjected to voir dire examination. At the time they testified PW1 and PW5 were about age 14 and 15 respectively. They were not children of tender years (Section 2 of The Children's Act) and so did not fall to be dealt with under Section 19 of The Oaths and Statutory Declarations Act. It is only in respect to children under the age of ten years that voir dire proceedings is mandatory. Here again, the appellants argument is without merit.

What about the strength of the prosecution evidence?

The evidence of PW1 was cogent and consistent. She gave an account of how the appellant had sexual intercourse with her on four different occasions. This was her evidence on the first incident-

"He was holding a knife in his hand. He told me not to fear the knife as he was not going to kill me. He then asked me to remove my clothes and I did. He asked me to sit down and I did and we engaged in sexual intercourse. I felt pain and started crying. He removed his clothes and we engaged in sexual. He inserted his sexual organ into mine."

PW2, PW4, PW5 and PW6 all gave a story of the existence of an inappropriate relationship between the appellant and PW1. PW5 a girl of 15 years and an older sister to the complainant stated as follows-

"Accused would come to my grandmother's home and then when he leaves, T follows him. T told me

they used to sleep together. She would take half or one hour away. She would also ask me to escort her to see accused where they would have agreed to meet. They would then go into the bushes to have intercourse as I wait on the part. I was then in standard four."

The emerging evidence is that there was a sexual relationship between the complainant and the appellant which was known to PW5. The complainant was a minor and incapable of giving lawful consent. That there was penetration was corroborated by the medical evidence of the P3 form produced. The medical examination was carried out on 20th November 2007 and the medical officer made the following observations-

"No external injury, but hymen absent and penetration present."

I am inclined to agree with the learned Magistrates finding that an offence of defilement had been committed.

The Defence set up by the appellant was that he was a victim of a vendetta by the complainant's relatives. That the complainant only mentioned his name under coercion and intimidation. The learned Magistrate gave due consideration to the defence but disbelieved it. The court rendered itself as follows-

"The accused says that his arrest was out of ill-will. However, he did not say who in particular in the complainant's family bore a grudge against him and why. He never raised that issue with any witness in cross-examination. His contention that the complainant had since become pregnant by another man is not material because that came after his arrest. He was arrested near the complainant's home under circumstances that raised reasonable suspicion from his past conduct that he was after her. I dismiss his defence as unworthy of belief.

The trial court was entitled to reach that conclusion and cannot be faulted.

Looked at as a whole the evidence before the trial court was sufficient to found a safe conviction and I would, as I now do, dismiss the appeal on conviction.

I turn now to the sentence. The medical age assessment of the complainant put her approximate age at 14 years as at 20th November 2007. The offences are alleged to have taken place on diverse dates between June 2007 and 14th November 2007. This court is willing to accept that the child was aged between 14 years and 15 years when defiled. A person who is found guilty of defiling a child between the age of 14 years and 16 years is punished under Section 8(3) of The Sexual Offences Act and the punishment provided is a jail term of not less than 20 years. The trial Magistrate imposed a sentence of 15 years imprisonment. There was no lawful reason to impose a sentence which is less than the minimum prescribed by the law. In exercise of the powers of this court donated by Section 354 3(b) of The Criminal Procedure Code I would have to right this wrong and I hereby enhance the sentence to a jail term of 20 years with effect from the date of conviction. I had cautioned the appellant of this possibility.

Those are my orders.

Dated and delivered at Mombasa this 23rd day of March, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

……. for state

Appellant in person
Court clerk - Moriasi

F. TUIYOTT
JUDGE